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No. 87-479

In The
Supreme Court of the United States
October Term, 1987

ENERGY COOPERATIVE, INC.,
JAY A. STEINBERG, TRUSTEE,
Petitioner,

v.

PHILLIPS PETROLEUM COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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RULE 28.1 LIST

PHILLIPS PETROLEUM COMPANY'S DIRECT AND INDIRECT SUBSIDIARIES AND AFFILIATES OWNED LESS THAN 100%*

Alaska Pipeline Service Company

Artic LNG Transportation Company

* Does not include companies required to issue one or more shares to directors or officers.

Canada Western Cordage Company, Limited

Canyon Reef Carriers, Inc.

Chisholm Pipeline Company

Cochin Refineries Limited

Colonial Pipeline Company

Dixie Pipeline Company

East Texas Salt Water Disposal Company

Explorer Pipeline Company

Great Yarmouth Port Labour Company Limited

Heat Transfer Research, Inc.

Iranian Marine International Oil Company–IMINOCO

Kenai LNG Corporation

Long Beach Oil Development Company

Multinational Gas and Petrochemical Services Limited

Norland GMBH fur Grundbesitz and Industrieanlagen

Norpipe A.S

Norpipe Petroleum UK Limited

Norsea Gas A/S

Norsea Gas GMBH

Norsea Pipeline Limited

Oil Insurance Limited (New)

Papago Chemicals, Inc.

Phillips Carbon Black Limited

Phillips Petroleum Chemicals

Phillips Petroleum International Andina, S.A.

Phillips Petroleum Singapore Chemicals (Private) Limited

Phillips Petroleum Tanker Management, Inc.

Phillips Petroleum Toray Inc.

Phillips-Imperial Petroleum Limited

Polar LNG Shipping Corporation

Renolit-Haus GMBH

Solar Gas, Inc.

SPODCO Limited

SPODCO-USA, Inc.

The Salk Institute Biotechnology/Industrial Associates, Inc.

Venezoil, C.A.

Western Desert Operating Petroleum Company (WEPCO)

White River Shale Oil Corporation

Bissendorf Biosciences GMBH

Insurance & Reinsurance Brokers (Bermuda) Limited

Multinational Gas and Petrochemical Company

TABLE OF CONTENTS

Page

RULE 28.1 LIST i

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

REASONS FOR DENYING WRIT 2

I. There Is No Conflict Among The Circuits As To The Criteria Used For Defining A Cause of Action 2

II. There is No Special or Important Reason For Defining a Cause of Action in This Case 6

III. Since The Dismissal Order Provides That Creditors Received Notice, ECI's Due Process Argument Is A Collateral Attack On The Final Judgment 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases: *Page*

Baltimore Steamship Co. v. Phillips, 274 U.S. 316 (1927) 9

Expert Electric, Inc., v. Levine, 554 F.2d 1227 (2nd Cir.), *cert. denied*, 434 U.S. 903 (1977) 2, 3, 5, 7

Federated Dept. Stores, Inc., v. Moitie, 452 U.S. 394 (1981) 9

Gulf Oil Corp. v. Gilbert, 330 U.S. 501 (1947) 5

Harper Plastics v. Amoco Chemicals Corp., 657 F.2d 939 (7th Cir. 1981) 4

Harris v. Jacobs, 621 F.2d 341 (9th Cir. 1980) . . . 3, 4, 5

Herendeen v. Champion Intern. Corp., 525 F.2d 130 (2nd Cir. 1975) 3, 5

In Re Patel, 43 B.R. 500 (Dist.Ct.Ill. 1984). 10

Kremer v. Chemical Construction Corporation, 456 U.S. 481 (1982), *reh'g denied*, 458 U.S. 1133 (1982). . . 7

Nash Cty. Bd. of Ed. v. Biltmore Co., 640 F.2d 484 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981), *reh'g. denied*, 454 U.S. 1117 (1981). 3

Nevada v. United States, 463 U.S. 110 (1983), *reh'g denied*, 464 U.S. 875 (1983) 2, 5-7

Nilsen v. City of Moss Point, Miss., 701 F.2d 556 (5th Cir. 1983) 3

Purter v. Heckler, 771 F. 2d 682 (3rd Cir. 1985) . . 3, 5, 7

Sierra Club v. Secretary of Transp., 779 F.2d 776 (1st Cir. 1985) 4

Cases: *Page*

United States v. Memphis Cotton Oil Co., 288 U.S. 62 (1933) 2

Williamson v. Columbia Gas & Electric Corp., 186 F.2d 464, *cert. denied*, 341 U.S. 921 (1951) 6

Bankruptcy Court Rules

Rules Bankr. Pro. 9019 10

Treatises

Restatement (Second) of Judgments (1982) § 24 . . . . 4, 6

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondent Phillips Petroleum Company submits the following Brief in opposition to the petitioner Energy Cooperative, Inc., Jay A. Steinberg, Trustee's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

STATEMENT OF THE CASE

The Petitioner's Statement of the Case is inaccurate in two respects. The dismissal of the first suit against Phillips occurred in 1982 and not 1985. (Contrast page 4 of the Petition with the dismissal order at Appendix F.)

More significantly, the assertion on page 4 of the Petition that "No notice or opportunity to be heard was given to all creditors and other parties in interest . . ." is not supported by any reference to the proceedings below and conflicts with the dismissal order's finding that all creditors of ECI were present and consented to the entry of the dismissal. See, lines 7-9 of order at Appendix F.

The District Court dismissed this second action against Phillips on a basis independent of the doctrine of *res judicata*, finding that ECI's conduct in settling the first suit equitably estopped it from bringing this second action. Appendix B at pp. 3-4; Appendix D at p. 2.

In its briefs to the Seventh Circuit Court of Appeals, ECI relied ". . . primarily on cases applying Illinois res judicata law . . ." Seventh Circuit Opinion, Appendix A, p.6. ECI's petition for rehearing before the Seventh Circuit did not directly challenge the federal rules for defining a cause of action, and ECI did not seek a rehearing en banc to challenge the federal rule applied. The petition to this Court questions the federal rule for defining a cause of action for the first time.

REASONS FOR DENYING THE WRIT

I. There Is No Conflict Among The Circuits As To The Criteria Used For Defining A Cause of Action.

This Court and others have commented that the test for determining a cause of action is not subject to any mathematically precise definition. *Nevada v. United States*, 463 U.S. 110, 130-131, n. 12 (1983), reh'g denied, 464 U.S. 875 (1983); *United States v. Memphis Cotton Oil Co.*, 288 U.S. 62, 67-68 (1933). In *Expert Electric, Inc., v. Levine*, 554 F. 2d 1227 (2nd Cir.), *cert. denied*, 434 U.S. 903 (1977), the Second Circuit stated:

> While often cast in terms of "identity of issues", the determination as to whether claims are

> duplicative is not a matter of precision, nor subject to the application of any mechanical formula.
>
> 554 F. 2d at 1234

The Ninth Circuit agreed in *Harris v. Jacobs*, 621 F. 2d 341 (9th Cir. 1980):

> What constitutes a "cause of action" for purposes of *res judicata* "cannot be defined with precision," 1 B *Moore's Federal Practice and Procedure*, 0.410[1] at 1154, or "determined precisely by mechanistic application of a simple test."
>
> 621 F. 2d at 343

Instead of applying one inflexible test, the federal courts have adopted a uniform set of considerations or criteria to reach a decision on whether claims constitute the same cause of action. These common factors are (1) whether the primary right, duty and wrong are the same in each action; (2) whether the theory of recovery is the same; (3) whether the same evidence would be required in both actions and (4) whether the two suits arise out of the same nucleus of facts or transaction.

Cases in the Second, Third, Fourth, Fifth and Ninth Circuits recite all of these factors at once and have used one or more in the same case when reaching their decision. *See*, for example: *Herendeen v. Champion Intern. Corp.*, 525 F. 2d 130, 133, 134-135 (2nd Cir. 1975) and *Expert Electric, Inc., v. Levine*, 554 F. 2d 1227, 1234 (2nd Cir.), *cert. denied*, 434 U.S. 903 (1977); *Purter v. Heckler*, 771 F. 2d 682, 690 (3rd Cir. 1985); *Nash Cty. Bd. of Ed. v. Biltmore Co.*, 640 F. 2d 484, 488 (4th Cir.), *cert. denied*, 454 U.S. 878 (1981), *reh'g. denied*, 454 U.S. 1117 (1981); *Nilsen v. City of Moss Point, Miss.*, 701 F. 2d 556, 559-560, also n.4 (5th Cir. 1983); *Harris v. Jacobs*, 621 F. 2d 341, 343 (9th Cir. 1980).

While cases in the remaining circuits may not have applied all four factors at the same time, the criteria used did not deviate from the four considerations above. For

example, the First Circuit in *Sierra Club v. Secretary of Transp.*, 779 F. 2d 776 (1st Cir. 1985) adopted the transactional test espoused in the *Restatement (Second) of Judgments* (1982) § 24, comment b, but compared evidence to determine whether the facts in each suit were the same. *Id.* at 779-780. As noted on page 9 of ECI's petition, the Sixth Circuit has used at least three of the four factors, including the transactional approach. The Seventh Circuit has used at least two of the factors: whether both suits arise out of the same basic factual situation, and whether the right, duty and wrong are the same in both actions. *Harper Plastics v. Amoco Chemicals Corp.*, 657 F. 2d 939, 944 (7th Cir. 1981).

ECI's own analysis of the remaining circuits reveals no material deviation from the four considerations, although not all may be used in one case. The Eighth Circuit used the right-duty and operative facts approaches and stated in a recent case that it recognizes the "transactional" view. (Petition at pp. 10-11). The Tenth Circuit relied on the right-duty and same evidence factors. The Eleventh and District of Columbia Circuits employed the right-duty method and an analysis of the similarity of the facts. The Federal Circuit also compared similarity of facts.[1] *Id.* at 13.

The Courts' reliance on the four considerations to varying degrees in each case is no more a conflict than in other settled areas of the law which depend on multiple factors for resolution. For example, in deciding a *forum non conveniens* issue, a court may consider the ease of access to sources of proof, availability of compulsory process for witness attendance, enforceability of judgments, expense of

---

[1] In Respondent's view, no meaningful distinction can be made between the "transactional" approach and an analysis comparing the similarity of facts under the "operative" or "common nucleus" of facts approach.

alternative locations and the location of the injury or where the parties reside or do business. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). Arguing that a court's reliance on compulsory witness attendance and enforceability of judgments conflicts with another case relying on location of the parties or business records, is similar to ECI's position that the operative fact approach conflicts with the same evidence method. Analyzing rights and duties, comparing the same evidence or facts and/or deciding if a single transaction is involved are all established methods of determining a cause of action. Depending on the context, a court may apply one or more of these considerations.[2]

Many of the cases cited in ECI's Petition expressly refer to the above four factors as the "relevant criteria" for determining a cause of action and not as conflicting tests. *See, Herendeen v. Champion Intern. Corp.*, 525 F. 2d 130, 133 (2nd Cir. 1975); *Expert Electric, Inc. v. Levine*, 554 F. 2d 1227, 1234 (2nd Cir.), *cert. denied*, 434 U.S. 903 (1977); *Purter v. Heckler*, 771 F. 2d 682, 690 (3rd Cir. 1985); *Harris v. Jacobs*, 621 F. 2d 341, 343 (9th Cir. 1980). Two of these cases stated that all four of the considerations are similar: "The crucial element underlying all of these standards is the factual predicate of the several claims asserted. For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." *Expert Electric* at 1234; *Harris v. Jacobs* at 343. None of ECI's authorities recognized the four approaches as inconsistent or in conflict.

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[2] This Court has recognized there is more than one consideration in determining a cause of action. *See, Nevada v. United States*, 463 U.S. 110, n.12 at 130 *reh'g denied*, 464 U.S. 875 (1983): "Although the 'same evidence' standard was 'one of the tests' used at the time [Citation omitted], it was not the only one."

Indeed, with the exception of the Tenth Circuit, ECI's Petition confesses that circuits using less than all four factors have employed the "broader" transactional approach as one test. Hence, the probability that a court may bar a case by determining that two suits arose from the same transaction will not surprise any one who has done their legal homework. Transactional analysis has been performed in nearly all the circuits, appears in the *Restatement (Second) of Judgments* (1982) §24 as settled law and was approved by this Court as "a more pragmatic approach". *Nevada v. United States*, 463 U.S. 110, n.12 at 130 (1983).

II. There is No Special or Important Reason For Defining a Cause of Action in This Case.

Increasingly, courts are deciding claim preclusion issues by determining whether there was a full and fair opportunity to litigate claims in the first suit as opposed to defining a cause of action under a rigid test. In *Williamson v. Columbia Gas & Electric Corp.*, 186 F. 2d 464, *cert. denied*, 341 U.S. 921 (1951), the Third Circuit said:

> We do not think that the definition of "cause of action" in these cases is controlling on the question before us. The determination of the meaning of "cause of action" for purposes of deciding whether or not a person has slept on his rights is of little aid in deciding whether a prior judgment is a bar to the present action.
>
> The purpose of the principle of res judicata is to end litigation. The theory is that parties should not have to litigate issues which they have already litigated or had a reasonable opportunity to litigate.
>
> 186 F. 2d at 469

This Court employed a similar analysis in *Nevada v. United States*, 463 U.S. 110 (1983), *reh'g denied*, 464 U.S. 875 (1983):

> Definitions of what constitutes the "same cause of action have not remained static over time. [Citations omitted] We find it unnecessary in this case to parse any minute differences which these differing tests might produce, because whatever standard may be applied the only conclusion allowed by the record in the Orr Ditch case is that the Government was given an opportunity to litigate the Reservation's entire water right. . .
>
> 463 U.S. at 131

See also *Kremer v. Chemical Construction Corporation*, 456 U.S. 461, 485 (1982), *reh'g denied*, 458 U.S. 1133 (1982) and *Purter v. Heckler*, 771 F. 2d 682, 690 (3rd Cir. 1985).

A "full and fair opportunity" inquiry is more influential in determining whether a second action is barred than the criteria used to define a cause of action. It is revealing that ECI's petition concentrates solely on the abstract language characterizing each test but fails to compare the facts and results in cases using different guidelines. Regardless of the tests employed, these cases yielded similar results. None of the decisions permitted a plaintiff to bring a second suit involving the same facts or transaction but relying on a different legal theory. Regardless of which of the four considerations defining a cause of action are used, ECI had a full and fair opportunity to raise the preference theory in the first suit. ECI's bankruptcy had been pending nearly a year and a half before the first suit against Phillips was dismissed. This is more than enough time to investigate all of its claims against Phillips.

Selecting one test to determine a cause of action would not affect the result in this case for an additional reason. The District Court's holding that this suit was barred under equitable estoppel principles was independent of its decision to apply *res judicata*. Appendix B at pp. 3-4; Appendix D at p. 2. Moreover, the Seventh Circuit based its claim preclusion ruling on the right-duty factor as well as deciding both suits were based on the same transac-

tion. *See*, Appendix A, pp. 9-12 where the Court held that Phillips' right to set off claims in the second action against the first sufficiently "linked" the claims together.

None of the "parade of horribles" listed by ECI warrant the attention of this Court. For example, ECI complains: "Plaintiffs now *must* join all claims they *may* join." (Pet. at 15) This is just what *res judicata* is designed to promote. ECI further protests it will have to scrape the "bottom of the barrel" to add all its claims to the first suit. Certainly this is more desirable than confronting ECI's scrapings in a series of lawsuits. If ECI insists on dredging up baseless claims, it should reach the bottom of the barrel in the first suit and not in this one.

III. Since The Dismissal Order Provides That Creditors Received Notice, ECI's Due Process Argument Is A Collateral Attack On The Final Judgment.

The dismissal order in the first action against Phillips expressly stated that all of ECI's creditors were present and consented to the dismissal with prejudice:

> This matter coming on to be heard at the status report fixed herein; due notice having previously been given to all parties entitled thereto; counsel for the plaintiff having orally advised the court that the defendant has delivered to plaintiff all of the gasoline referred to in the complaint herein and that plaintiff has sold such gasoline for the benefit of this estate *and all of its creditors and counsel for plaintiff having orally moved for the entry of this order*; there being no objection to the entry of this order; and the court being fully advised in the premises;
>
> IT IS HEREBY ORDERED that the above-captioned adversary proceeding be and it is hereby dismissed with prejudice, each party to bear its own costs.
>
> Appendix F (Emphasis added)

As the above order reflects, all the parties entitled to notice received it. Significantly, the Bankruptcy Court's order recites that *all* of ECI's creditors were present and orally moved for entry of the dismissal. It is pure mystery how ECI argues that no creditor received notice of the dismissal and thus due process rights were violated. There is absolutely nothing in the record regarding notice except for the above order, and ECI does not cite to any reference in its Petition supporting its assertions that creditors received no notice. Pet. at 4 and 17.

Even if ECI could show no notice, the dismissal order unambiguously found notice to all of ECI's creditors and that they joined ECI in moving for a dismissal. Hence, ECI's attempt to challenge that finding is a prohibited collateral attack on the judgment order. As this Court held in *Federated Dept. Stores, Inc., v. Moitie*, 452 U.S. 394, 398-399 (1981):

> Nor are the *res judicata* consequences of a final unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle overruled in another case. [Citations omitted] As this Court explained in *Baltimore Steamship Co. v. Phillips*, 274 U.S. 316, 325, 71 L.Ed. 1069, 47 S. Ct. 600 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely on the plea of *res judicata* . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause of action." We have observed that "the indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of the judgments, consequences which it was the very purpose of *res judicata* to avert." [Citation omitted]

Also assuming the dismissal order could be collaterally attacked by ECI's bare assertion that there was no notice as required under the Bankruptcy Code, there is still no due process issue. While it may be debated whether creditors of a bankruptcy estate have a "constitutional" right to notice of any and all compromises, it is at least clear that there is no constitutional right to receive notice under the specific procedure set forth in Bankruptcy Rule 9019. This is because a bankruptcy judge may waive notice to creditors for good cause shown, and the order approving the compromise need not contain an express finding of good cause but may be implied. *In Re Patel*, 43 B.R. 500, 503 (Dist.Ct.Ill. 1984). Consequently, the fact that ECI's creditors had actual notice of the compromise, and orally moved for its entry along with ECI, satisfies any due process requirements which may be applicable.

CONCLUSION

For the foregoing reasons, the Petition For A Writ Of Certiorari should be denied.

Respectfully submitted,

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